(27,781)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 424.

DIRECTOR GENERAL OF RAILROADS ET AL.

vs.

THE VISCOSE COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1920.

1 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1920.

No. 2579.

DIRECTOR GENERAL OF RAILROADS et al.

vs.

THE VISCOSE COMPANY.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, Woolley and Haight, Circuit Judges.

Certificate to the Supreme Court.

In order to be guided to a proper decision of the controversy appearing upon the record of this appeal, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court; and accordingly certifies, under Section 239 of the Judicial Code, the question or proposition of law hereafter stated. The question arises upon the following facts:

On December 26, 1917, the President of the United States, by proclamation made pursuant to powers vested in him by the Congress, took possession and assumed control of the transportation systems of the United States, and appointed an agent with authority to operate the same, designated the Director General of Railroads.

The Act of Congress entitled "An Act to provide for the operation of transportation systems while under Federal Control, for the just compensation of their owners, and for other purposes" was approved March 21, 1918 (Chapter 25 Stat. of U. S. 1917-1918), and under this Act, in pursuance of authority therein conferred, the President appointed an Agent, also designated the Director General of Railroads, to do and perform all and singular the acts and things
2 and to exercise all and singular the powers and duties which in and by the said Act, or any other act in relation to the subject thereof, the President was authorized to do and perform.

On the 10th day of December, 1919, Walker D. Hines, then the Director General of Railroads, under the authority so conferred upon him, filed with the Interstate Commerce Commission, in accordance with the Act to Regulate Commerce, a tariff known as "Consolidated Freight Classification No. 1," which became effective December 30, 1919, and which contained at page 363, Items 31, 32, 33 and 34 (copy of which page is hereto attached as Exhibit A) descriptions and ratings covering artificial silk, as well as natural silk and raw silk, as contained in previous issues of Freight Classifications of the individual carriers prior to Federal control and continued in effect under Federal control.

Artificial silk had been recognized, accepted and carried by the railroads of the United States for a long term of years and had never been refused transportation as freight.

Thereafter, under date of January 21, 1920, there was issued by the United States Railroad Administration, Director General of Railroads, Freight Rate Authority No. 21474, corrected, (set forth in full as Exhibit B hereof) authorizing amendment to said "Consolidated Freight Classification No. 1," to cancel the ratings on silk, provided for in Items 32, 33, and 34, page 363, and to amend Rule 3 of said Classification to include the same articles in the list of commodities that will not be accepted for shipment.

On the 28th day of January, 1920, the said Director General of Railroads, duly filed with the Interstate Commerce Commission, "(without representations as to its effect upon traffic in the appellee's products, as hereinafter set forth) Supplement No. 2 Consolidated Freight Classification No. 1," which said supplement, to become effective by its terms on February 29, 1920, at page 36, Items 5 and 6, cancelled said Items and ratings shown under said Items, 31, 32, 33 and 34, page 363, of said "Consolidated Freight Classification No. 1" relating to silk, artificial or natural, and at page 17 amended said Rule 3 of said "Consolidated Freight Classification No. 1," so as to read as follows:

3 Rule 3.

Effective Feb. 29, 1920.
(Cancels Rule 3, page 3 of Classification.)
Property of extraordinary value not accepted.

Unless otherwise provided the following property will not be accepted for shipment nor as premiums accompanying other articles: Bank Bills, Coin or Currency; Deeds, Drafts, Notes or Valuable papers of any kind; Jewelry, Postage Stamps or Articles with Postage Stamps affixed; Precious Metals or Articles Manufactured therefrom; Precious Stones, Revenue Stamps; *Silk, artificial or natural, Raw, Spun, Schappe or Thrown, including Organzine, Singles, Tram or Yarns,* or other articles of extraordinary value.

Published for the Director General of Railroads and filed on thirty days' notice with the Interstate Commerce Commission under Freight Rate Authority No. 21474 *corrected, of the Director, Division of Traffic, United States Railroad Administration, dated January* 21, 1920.

The change produced by the amendment consisted in the addition to the list of prohibited articles of silk, artificial or natural, as indicated by the underscoring, which had never been included in the list of articles not accepted for shipment or under Rule 3.

The Viscose Company, the appellee, is engaged at Marcus Hook, Pennsylvania, and Roanoke, Virginia, in the manufacture of a commodity known as "artificial" or "fibre silk," which is produced by a secret process and is largely used in the manufacture of hosiery, neckties, underwear and rugs, and is sold in many parts of the

United States. The output of the Marcus Hook plant is approximately 9,000,000 pounds of artificial or fibre silk per year, while that of the Roanoke plant is about 2,000,000 pounds per year. The appellee is erecting a plant at Lewistown, Pennsylvania, with a capacity of approximately 4,000,000 pounds per year. Its commodity is worth about $7.00 per pound, and its sales approximate 44,000 pounds per day. It maintains that it is necessary to have about 80% of its output transported by freight, because, it claims, that not more than 15% of its production can be handled by the facilities for shipment by express at the said plants, and only about 5% can be handled by motor trucks.

The Viscose Company, believing that the denial of transportation by freight through the act of the Director General of Railroads in proposing to put into effect said "Supplement No. 2 to Consolidated Freight Classification No. 1" would cause it great and irreparable damage in the loss of gross sales of approximately $246,000 per day, filed, on the 26th day of February, 1920, in the District
4 Court of the United States for the Eastern District of Pennsylvania, a bill of complaint against said Walker D. Hines, Director General of Railroads, Pennsylvania Railroad Company, Norfolk & Western Railway Company, and others, praying (1) that they be enjoined from putting into effect and enforcing the provisions of said "Supplement No. 2 to Consolidated Freight Classification No. 1" designed to cancel the existing classification of artificial silk as a commodity of freight; and (2) that they, the carrier defendants, be enjoined from refusing to accept from the Viscose Company artificial or fibre silk for transportation under classifications which existed prior to the effective date of said Supplement No. 2, or under such other classification as may be put into effect thereafter; and (3) that the defendants be enjoined from amending Rule 3 of said Classification that artificial or fibre silk shall no longer be acceptable for transportation by said defendant carriers as freight.

Although its jurisdiction was challenged, the District Court issued a preliminary injunction as asked by the first and second prayers of the bill, and, on final hearing, made the same perpetual. From its final decree, the defendant carriers and others appealed to this court.

The question upon which the Circuit Court of Appeals desires instruction is the following:

Did the District Court have jurisdiction to decide the matter raised by the complainant's bill and thereupon to annul the said action of the Director General of Railroads and enjoin the carriers from complying therewith?

JOS. BUFFINGTON,
VICTOR B. WOOLLEY,
THOMAS G. HAIGHT,
Circuit Judges.

5 EXHIBIT "A."

Items.	Articles.	Ratings. Official.	Southern.	Western.
31.	Silk, artificial or natural, value declared in writing by the shipper, or agreed upon in writing as the released value of the property, in accordance with the following:			
32.	Raw, see Note 1:			
	If value does not exceed one dollar per pound, in bags, bales, or boxes.....	1	1½	1
	If value exceeds one dollar per pound, in bags, bales or boxes.....	1½	D1	1½
	If consignor declines to declare value, or agree to released value in writing, shipment will not be accepted.			
33.	Spun, Schappe or Thrown, including organzine, Singles Tram or Yarns, see Note 1:			
	If value does not exceed one dollar per pound, in bags, bales, or boxes.....	1	1½	1
	If value exceeds one dollar per pound, in bags, bales or boxes.....	1½	D1	1½
	If consignor declines to declare value, or agree to released value in writing, shipment will not be accepted.			

34. NOTE 1.—The value declared in writing by the shipper; or agreed upon in writing as the released value of the property, as the case may be, must be entered on shipping order and Bill of Lading as follows:

"I hereby declare the value of the Silk, artificial or natural herein described as $— per pound."

____ ____,
Shipper's Signature.

or

"The value of the Silk, Artificial or Natural herein described is hereby agreed upon as $— per pound."

____ ____,
Shipper's Signature.

(Issued under authority of Interstate Commerce Commission's Released Rates Order No. 85 of Nov. 13, 1919.)

6 EXHIBIT "B."

Freight Rate Authority No. 21474.

File No. 64.

United States Railroad Administration.

Director General of Railroads.

Washington.

Division of Traffic, Edward Chambers, Director.

January 21, 1920.

Please refer to File No. B File F-25-1542-I.

Freight Rate Authority No. 21474—Corrected.

Mr. R. C. Fyfe, Chairman,
Consolidated Classification Committee,
Chicago, Illinois.

DEAR SIR:

This will authorize, effective on thirty days' notice, amendment to Consolidated Freight Classification No. 1 to cancel the ratings on Silk provided for in Items 32, 33 and 34, page 363, and to amend Rule 3 of said Classification to include the same articles in the list of commodities that will not be accepted for shipment.

Yours very truly,
(Signed) EDWARD CHAMBERS.
P. P. H.

cc
JE Crosland, Atlanta, Ga.
RN Collyer.
GM Crosland.
Director Thelen.
AC Johnson.
EP Bates.
NB Wright.

Numerical File.
E 12-77.

Endorsements: 2579. Certificate of Questions for Submission to Supreme Court. Received & Filed Jun. 7, 1920. Saunders Lewis, Jr., Clerk.

7 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original certificate of questions of this Court for submission to Supreme Court in the case of Director General of Railroads, et al., vs. The Viscose Company, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this seventeenth day of June, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 27,781. U. S. Circuit Court Appeals, 3rd Circuit. Term No. 424. Director General of Railroads et al. vs. The Viscose Company. (Certificate.) Filed June 28th, 1920. File No. 27,781.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 424.

DIRECTOR GENERAL OF RAILROADS, PENNSYLVANIA RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, ET ALS., DEFENDANTS AND APPELLANTS,

vs.

THE VISCOSE COMPANY.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION TO ADVANCE.

Now come the Director General of Railroads, The Pennsylvania Railroad Company, Norfolk and Western Railway Company, and others, by their attorneys of record, and respectfully move this honorable court to advance the above-entitled

matter and to assign the same for hearing at an early day to be designated by the court.

As ground for such motion, it is shown that the question certified for the decision and instruction of this honorable court involves the existence *vel non* of jurisdictional power in the District Courts of the United States to enjoin interstate common carriers by steam railroads from conforming to the provisions of Rule 3 of "Supplement No. 2, Consolidated Freight Classification No. 1," as same was duly filed with the Interstate Commerce Commission by the Director General of Railroads on the 28th day of January, 1920, effective February 29, 1920.

STATEMENT.

The freight classification rule number 3 above referred to is as follows, to wit:

"Effective Feb. 29, 1920. (Cancels Rule 3, page 3, of Classification.)

Property of extraordinary value not accepted."

> "Unless otherwise provided the following property will not be accepted for shipment nor as premiums accompanying other articles: Bank Bills, Coin or Currency, Deeds, Drafts, notes or valuable papers of any kind; Jewelry, Postage Stamps or Articles with Postage Stamps affixed; Precious Metals or Articles manufactured therefrom; Precious Stones, Revenue Stamps; Silk, artificial or natural, Raw,

Spun, Schappe or Thrown, including Organzine Singles, Tram or Yarns, or other articles of extraordinary value."

"Published for the Director General of Railroads and filed on thirty days' notice with the Interstate Commerce Commission under Freight Rate Authority No. 21474 corrected, of the Director, Division of Traffic, United States Railroad Administration, dated January 21, 1920."

The Viscose Company, party hereto, is engaged in the manufacture of a commodity known as "artificial" or "fibre silk," turning out upwards of 10,000,000 pounds thereof per annum, valued at $7.00 per pound, and claims that about 80 per cent of its output (must be) transported by freight, because, * * * not more than 15 per cent of its production can be handled * * * by express (facilities) at * * * (its) plants, and only about 5 per cent can be handled by motor truck (R., 3).

Without complaint first made to the Interstate Commerce Commission attacking the reasonableness of the practice prescribed in and by said Rule 3 of "Consolidated Freight Classification No. 1," on file as aforesaid, The Viscose Company filed its bill of complaint in the District Court of the United States for the Eastern District of Pennsylvania, praying injunction and other relief.

The jurisdiction of said district court to grant the relief prayed was promptly challenged by the Director General of Railroads and the interstate

carriers concerned, and, such challenge having been overruled, injunction was granted and decreed.

From such decree appeal was duly taken to the Circuit Court of Appeals for the Third Circuit, which, as before said, has certified the question of jurisdiction to this court for its decision and instruction.

The position of interested railroad carriers in this connection has been rendered peculiarly complicated and difficult by reason of the fact that a similar suit was instituted against above-named Director General of Railroads, The Pennsylvania Railroad Company, and numerous other interstate carriers by steam railroads, in the United States District Court for the Southern District of New York, wherein Cheney Brothers, American Raw Silk Trading Company, Inc., and others engaged in the purchase and sale of raw silk, artificial silk, thrown silk and spun silk, all claiming to be directly affected by the provisions of said Rule 3 of Consolidated Freight Classification No. 1 as amended, are plaintiffs. In said suit said District Court for the Southern District of New York (Mayer, J., sitting) refused the relief prayed, "solely upon the ground that the court lacks jurisdiction to issue such restraining order and temporary injunction."

On appeal to the Circuit Court of Appeals for the Second Circuit, that court, after hearing and consideration (Hough, Cir. J., dissenting), reversed the order of said District Court for the

Southern District of New York and remanded the cause for further proceedings, and said cause is now pending in said district court.

Because of the above indicated divergent views and decisions of the judges assigned to the second and third circuits respectively, and because of the discriminations inevitably incident thereto, which discriminations "The Act to Regulate Commerce" and acts amendatory thereof were intended to obviate, and because of the almost daily tender to interstate carriers by steam railroad for transportation of articles the carriage of which as freight was sought to be precluded by the provisions of said Rule 1 of Supplement 2, Consolidated Freight Classification No. 1, as amended, it is respectfully represented that the early consideration and disposition by this court of the question certified by the Circuit Court of Appeals for the Third Circuit is of such gravity and importance and of such grave public interest that this motion to advance should be granted.

Respectfully submitted,

F. Markoe Rivinus,
Henry Wolf Bikle,
Frederic D. McKenney,
Theodore W. Reath,
Attorneys for Director General of Railroads, The Pennsylvania Railroad Company, Norfolk & Western Railway Company, et als.

To THE VISCOSE COMPANY and
HAROLD S. SHERTZ, Esquire,
Solicitor for The Viscose Company:

Please take notice that on Monday, October 11, 1920, or so soon thereafter as counsel may be heard, the foregoing motion to advance the above-entitled action for hearing at an early day will be submitted to the Supreme Court of the United States for its consideration and action.

F. MARKOE RIVINUS,
HENRY WOLF BIKLE,
FREDERIC D. MCKENNEY,
THEODORE W. REATH,
Attorneys for Director General of Railroads and others.

Receipt of copy of foregoing motion to advance and notice of intention to submit same is acknowledged this 13 day of September, A. D. 1920.

Harold S. Shertz
Attorneys for The Viscose Co.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 424.

Director General of Railroads, et al.,

vs.

The Viscose Company.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF CARRIERS, APPELLANTS.

I. STATEMENT OF THE CASE.

This case had its origin in a bill in equity filed February 26th, 1920, in the United States District Court for the Eastern District of Pennsylvania, praying that the defendants, the Director General of Railroads, The Pennsylvania Railroad Company and the Norfolk & Western Railway Company, be enjoined from putting into effect and enforcing the provisions of a supplement (No. 2) to a tariff known as Consolidated Freight Classification No. 1, designed to

cancel the existing classification of artificial silk as a commodity of freight, and that they, the carriers defendant, be enjoined from refusing to accept from the Viscose Company artificial or fibre silk for transportation under classifications which existed prior to the effective date of the said supplement, or under such other classification as might be put in effect thereafter (Trans., page 3).

Prior to the filing of the supplement referred to, artificial silk had been accepted and carried by the railroads of the United States; but under date of January 21st, 1920, the Director General of Railroads authorized an amendment to the Consolidated Freight Classification No. 1, to cancel the ratings on silk and to amend a rule (No. 3) of the said classification so as to include silk articles in the list of commodities which would not be accepted for shipment (Trans., page 2). The Viscose Company, a corporation engaged at Marcus Hook, Pennsylvania, and Roanoke, Virginia, in the manufacture of a commodity known as artificial or fibre silk, believing that the denial of transportation under the classification provided for in the said supplement would cause it great and irreparable damage, filed the bill in equity above described. The jurisdiction of the District Court was challenged on the ground that the question presented was properly cognizable only by the Interstate Commerce Commission, but the District Court issued a preliminary injunction granting the relief asked for (263 Fed. 726), as stated above, and on final hearing made the same perpetual. From this decree the defendant carriers appealed to the Circuit Court of Appeals, which has certified to this Court the question of jurisdiction.

Briefly stated, the question presented is whether the action of the Director General in including artificial silk in the class of commodities which, under the supplement to the classification referred to, are denied transportation by freight under class rates is cognizable by the Court or only by the Interstate Commerce Commission.

A suit substantially identical with the case at bar was initiated at about the same time in the United States Dis-

trict Court for the Southern District of New York by Cheney Brothers and others against the Director General of Railroads, The Pennsylvania Railroad Company, and others, asking substantially the same relief as was asked in the present case. The District Judge (Mayer, J.) declined to issue a preliminary injunction on the ground that he had no authority to do so, whereupon the case was taken by appeal to the United States Circuit Court of Appeals for the Second Circuit, which reversed the decision of the District Judge. The opinion filed was the opinion of Ward, J. Rodgers, J., concurred; Hough, C. J., dissented. See Cheney Brothers *vs.* Railroads, *266* Fed. 310 (1920).

II. ARGUMENT.

Counsel for the Viscose Company relies upon what he conceives to be rights arising out of the common law of common carriage. But this case depends for its decision on the comprehensive system of regulation established by Congress in the Interstate Commerce Act, and the common law cases are inapplicable. Moreover, the common law cases do not touch the question *whether a carrier may change the scope of its public profession.* They have to do with the duty of the carrier to carry *according to its public profession.**

A. The injunction issued by the District Court, constituted an attempt to control classification as well as an attempt to adjudicate the propriety of a regulation of the carriers. In either aspect it discloses an assumption of authority to deal with a matter confided by Congress exclusively to the administrative control of the Interstate Commerce Commission.

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* At common law the scope of its profession determined the obligation of the carrier to transport: Tunnel *vs.* Pettijohn, 2 Harrington (Del.) 48 (1836); Ocean Steamship Co. *vs.* Savannah Locomotive Works, 131 Ga. 831 (1909), 20 L. R. A. (N. S.), 829.

I. The Subject Matter of this Litigation is a Classification or Regulation within the Meaning of the Interstate Commerce Act, or it is both.

(a) *It may be properly regarded as classification.*

Section 15 of the Act to Regulate Commerce empowers the Commission "whenever after full hearing * * * the Commission shall be of opinion * * * that any individual or joint classification * * * is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act" to make an order requiring the carrier or carriers to cease and desist from such violation to the extent to which the Commission finds the same to exist (34 Stat. L. 584, as amended by 36 Stat. L. 539).

This jurisdiction over classification was conferred on the Commission by the Amendment of 1910 (36 S. L. 539), and the purpose was to include classification as well as rates (House Report No. 923, 61st Congress 2nd Session), or, to remove any doubt (Senate Report No. 355, 61st Congress, 2nd Session).

Section 6, which requires carriers to publish schedules of rates, fares and charges, also provides that "the schedules printed as aforesaid by any such common carrier * * * shall contain the classification of freight in force," thus making appropriate classification a part of the tariff structure.

It is important, therefore, to determine the meaning of "classification" as occurring in Section 6 (24 Stat. L. 379, as amended by 34 Stat. L. 584, 36 Stat. L. 545) and Section 15 of the Act to Regulate Commerce.

In general, carrier tariffs are divisible into two kinds. Commodity rates are published for commodities of peculiar characteristics or which move in great and regular volume, such as coal, grain, iron ore, etc. The class rates are published for general merchandise and articles of ordinary freight transportation. These class rates are accompanied by a classification which groups articles for the purposes of

the accompanying rate schedules; necessarily classification is part of the rate publication.* Commodity rates are also published where no established class rate constitutes an appropriate charge for a given service. Thus the class rates applicable between New York and Chicago are:—

1	2	3	4	5	6
1.57½	1.38½	1.05	.73½	.63	.52½

If it is desired to accord a commodity any rate other than one of these six rates named, or a rate determined by reference thereto, *c. g.*, a multiple thereof, it must be given a commodity rate. The decision of the District Judge proceeds on the erroneous theory that a denial of

* There is, of course, a well established distinction between class rates and commodity rates, as evidenced by Rule 7 (*a*) of Tariff Circular No. 18-A, revised by order of the Interstate Commerce Commission, effective March 31st, 1911 (Publication of the Government Printing Office):

"In every instance where a commodity rate is named in a tariff upon a commodity and between specified points such commodity rate is the lawful rate and the only rate that may be used with relation to that traffic between those points, even though a class rate or some combination may make lower. The naming of a commodity rate on any article or character of traffic takes such article or traffic out of the classification and out of the class rates between the points to which such commodity rate applies.

"Class rates or commodity rates may be made for specified mixed shipments and will be the lawful rates for such mixtures, even though certain parts of the mixtures are covered by class or commodity rates when shipped separately."

There are also certain principles regarding the propriety of class and commodity rates. Among others may be cited the following principle from the case of James & Abbot Company *vs.* B. & M. Railroad, 17 I. C. C. 273 (1909), at page 275:

"There is no large volume of traffic in brick moving between these points. The contention was that the shipments should have been hauled at rates made on common cheap brick. It is generally recognized that class rates on heavy commodities are made to move the more or less limited shipments from place to place, and commodity rates to move large, steady shipments."

Both kinds of rates have come before this Court. Thus I. C. C. *vs.* C. R. I. & P. Ry., 218 U. S. 88 (1910) involved class rates, while I. C. C. *vs.* L. & N. R. R., 227 U. S. 88 (1913) involved both class and commodity rates. On page 94 the Court says:

"With the exception of a change made necessary by the construction of a short line from Memphis to Birmingham, the class rates in that territory were, as a rule, maintained in conformity with the Cooley award though, from time to time, commodity rates were made to meet special conditions."

classification and class rates to a given commodity as of too great value would permanently deny freight transportation to the article. The contrary is true, as the classifications would leave such articles to the carriers' commodity tariffs. Silk could still move under commodity tariffs, if published, and the Commission under its administrative function could, after hearing, establish through routes and joint rates for that commodity if this should be found reasonable on the evidence and to the extent that such commodity tariffs are not already in existence.

The office of classification as the word implies is (*a*) to select, list and describe any articles of merchandise, etc., which will be accepted for freight transportation under class rates, and (*b*) to distribute these articles so listed into the classes to which the tariff will apply the different grades of class rates.

Thus in Broadnax *vs.* Missouri, 219 U. S. 285 (1911), this Court considered the constitutionality of selection of future sales for taxation out of all sales contracts and denied that such a "stamp tax is not a true classification." The case is interesting as indicating the ordinarily accepted meaning of "classification" as meaning a selection of some and rejection of other subjects of taxation or whatnot.

The Interstate Commerce Commission has continuously exercised the power to determine the reasonableness of exclusion of articles by carriers from class rates in publishing classifications. Thus in Lake-and-Rail Butter and Egg Rates, 29 I. C. C. 45 (1914), the exclusion of butter, eggs and dressed poultry from transportation by lake and rail was found unreasonable by the Commission and the class rates on those commodities restored. In the Consolidated Classification Case, 54 I. C. C. 1 (1919), at page 14, the Commission considered the reasonableness of rule 3 which excludes from class rates "articles with postage stamps affixed" and held that such articles were properly excluded from freight transportation. And in the Western Classification Case, 25 I. C. C. 442 (1912), at pages 477-8, the Commission considered the exclusion of green hides in such a condition as to damage

other freight from classification, and decided that that refusal until special equipment could be obtained seemed reasonable.

So the Supreme Court of North Carolina in Tilley *vs.* Norfolk & Western Ry. Co., 162 N. C. 37 (1913), held that the reasonableness of the exclusion of hay not baled, marked or packed, from the North Carolina classification, was a matter for the State Corporation Commission to decide under its administrative function which was carried into state statutes as to intrastate commerce in phrasing substantially similar to the authority under the Commerce Act of the Interstate Commerce Commission. Accordingly, a suit in the state court for a penalty for refusal to receive and carry such hay so excluded from the state classification was held not maintainable.

(b) *The subject matter of this litigation may be properly regarded also as a regulation.*

The Act to Regulate Commerce devolves upon the Interstate Commerce Commission the authority to adjudicate the reasonableness, etc., of "regulations" established by the carriers. Thus paragraph (1) of Section 15 (the same paragraph that deals with the jurisdiction of the Commission over classification), provides:—

> "That whenever, after full hearing * * * the Commission shall be of opinion * * * that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation or practice is or will be just, fair and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such

violation to the extent to which the Commission finds that the same does or will exist," etc.

It is to be noted that this jurisdiction is not limited to the kind of rules and regulations required to be published in tariffs under the provisions of the first paragraph of Section 6 of the Interstate Commerce Act. The rules and regulations so required to be published are such as "in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee." But these qualifying words do not appear in Section 15, and the Commission's regulatory authority is not restricted to the administrative control of *tariff* matters. Section 15 formerly contained the phrase "affecting such rates" as a qualification of the Commission's jurisdiction of classifications, regulations and practices, but this was stricken out by the Amendment of 1910 (36 Stat. L. 539).

An instance of the exercise of this jurisdiction is found in the decisions of this Court in I. C. C. *vs.* Illinois Central R. R., 215 U. S. 452 (1910); Baltimore & Ohio R. R. *vs.* U. S., 215 U. S. 481 (1910), and Morrisdale Coal Co. *vs.* P. R. R., 230 U. S. 304 (1913), where it has been held that the determination of the proper regulations for the distribution by carriers of their coal car equipment is a matter primarily and exclusively within the jurisdiction of the Commission. Such regulations are not required to be published in tariffs and are not so published, though the carriers' practices in this regard are subject to the full control of the Commission.

The regulation here in issue, which, as stated above, is believed to be itself a classification—since it defines the group of articles that will not be accepted for transportation under class rates—is published in a supplement to the tariff known as Consolidated Freight Classification No. 1.*

* This consolidated classification, which became effective December 30th, 1919, (Transcript, page 1) superseded previous issues of the freight classifications of the various carriers, the principal of which were, the Official, the Western and the Southern: see I. C. C. *vs.* D. L. & W., 220 U. S. 235 (1911), at pages 241 and 242.

Classification tariffs have been in effect for many years, and their characteristics are probably familiar to the Court (I. C. C. *vs.* D. L & W., 220 U. S. 235, 1911). Their function, in addition to classifying commodities customarily accepted by the carriers for transportation by freight, under class rates, is to establish ratings, *rules* and *regulations* applicable to such traffic.

The classification ratings, rules and regulations thus established are *generally* applicable throughout the territory in which the given classification tariff is in force, the purpose being to establish a *general* basis for the transportation of freight and *general* rules and regulations applicable thereto.

One of the regulations of the classification was brought before this Court in the case above alluded to, viz., Interstate Commerce Commission *vs.* D. L. & W. R. R., being the rule of the classification which required that a shipment, in order to enjoy the carload rate, must be delivered at one receiving station on one day, by one consignor consigned to one consignee, etc. The rule was qualified by a "note" providing that the rule would apply only when the consignor or consignee was the actual owner of the property, and it was this note that constituted the subject matter of the controversy. The classifications have customarily published other rules and regulations, such as those determining the measure of liability offered by the carriers in conjunction with different rates, regulations establishing the manner in which shipments shall be packed in order to be accepted for transportation, regulations determining whether the duty of loading and unloading shall devolve on the carrier or on the shipper, regulations determining carload minima, regulations determining the ratings to be applied on a carload shipment consisting of articles of different classes, regulations governing the transportation of perishable property, &c.

It is, nevertheless, permissible for any carrier or group of carriers to establish special rules and regulations applicable in a more limited locality just as it may establish commodity rates as explained above. These special rules and regulations are usually established in tariffs known

as "Exceptions to the Official [or other] Classifications."* Thus, for example, while the classification provides that shippers and consignees shall load and unload carload freight, The Pennsylvania Railroad Company by exceptions thereto provides that at certain points on its railroad and under certain conditions it will load and unload such freight.†

One of the regulations included in the classification and *itself a classification*, as already shown, is the rule specifying articles which will not be accepted for transportation by freight, thus creating a class of commodities outside the scope of the carrier's public profession so far as class rates are concerned. This regulation in the Consolidated Freight Classification, as published December 30th, 1919, is known as Rule 3, and is as follows:—

> "Unless otherwise provided the following property will not be accepted for shipment nor as premiums accompanying other articles: Bank bills, coin or currency; deeds, drafts, notes or valuable papers of any kind; jewelry, postage stamps or articles with postage stamps affixed; precious metals or articles manufac-

* The tariffs known as exceptions to the Official [or other] Classification are well known. In fact, the Commission provides a special rule with regard to this tariff known as Rule 16 (*a*) of Tariff Circular No. 18-A, revised by order of the Interstate Commerce Commission effective March 31st, 1911 (v., *supra*, note, page 5):

> "A carrier may grant to a joint agent authority to publish and file for it classification and supplements thereto and exceptions to the classification; or, such exceptions may be published by the carrier in its own issues, either as parts of individual tariffs, or in a publication that is given an I. C. C. number, that is filed and posted as required, and that is devoted to such exceptions. (See Rule 3 (*e*).) Such exceptions and changes therein may be made only on statutory notice or under special permission for shorter time.
>
> "In so far as is reasonably practicable exceptions should be included in the tariff which they affect."

Many instances of exceptions to the Classification will be found in the decisions of the Interstate Commerce Commission. The following illustrations will suffice: Marx & Son *vs.* I. C. Railroad Company, 36 I. C. C. 519 (1915) at page 512; Ludowici-Celadon Company *vs.* Railroads, 39 I. C. C. 407 (1916), at page 408; Pacific Coast Biscuit Company *vs.* Southern Pacific Co., 49 I. C. C. 115 (1918), at page 116; Anheuser Busch Brewing Association *vs.* Railroads, 52 I. C. C. 555 (1919), at page 556.

† See Keystone Warehouse Co. *vs.* P. R. R., 53 I. C. C. 335 (1919).

tured therefrom; precious stones, revenue stamps, or other articles of extraordinary value."

As heretofore stated, the Director General of Railroads, on the twenty-eighth day of January, 1920, duly filed with the Interstate Commerce Commission a supplement (No. 2) to the tariff known as Consolidated Freight Classification No. 1, whereby this regulation was amended so as to extend the class of articles excluded from transportation under class rates by adding to this class "silk, artificial or natural, raw, spun, schappe or thrown, including organzine, singles, tram or yarns."

But the publication of this amendment to the rule of the classification still left the individual carriers free to engage in the transportation of silk in specified localities by filing exceptions to the classification or by filing commodity tariffs.

2. WHETHER THE SUBJECT MATTER OF THIS LITIGATION BE REGARDED AS CLASSIFICATION OR AS A REGULATION—IN EITHER ASPECT IT IS EXCLUSIVELY WITHIN THE ADMINISTRATIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

The question presented to this Court is whether the propriety of the change in the regulation or the classification above described constituted an issue cognizable by the courts. It is the contention of the carriers that it is an issue confided by Congress to the administrative control of the Interstate Commerce Commission.

The reasons for their contention in this regard are briefly stated as follows:—

(1) The provision of the supplement *is* a "classification" and also a "regulation," clearly within the intendment of the words of the statute.

(2) The Commission has asserted and exercised jurisdiction of controversies of this character: see cases, *supra*, page 6. Its views as to the interpretation of the Act are entitled to respect: New Haven &c. R. R. *vs.* I. C. C., 200 U. S. 361 (1906), at page 401: see also Logan *vs.* Davis, 233 U. S. 613, at page 627 (1914).

(3) The reasons which in other cases have been regarded as demonstrating the primary jurisdiction of the Commission apply here. If there is to be uniformity of regulation and the avoidance of discrimination, the authority of the Commission must be sustained.

The present litigation affords an impressive argument in favor of the Commission's authority. For, while the District Court in the present case asserted jurisdiction and required the carriers, parties to this case, to continue the transportation of silk under class rates, Judge Mayer in the District Court of the United States for the Southern District of New York denied court jurisdiction leaving the regulation in effect.* The result was that The Pennsylvania Railroad Company was required by the injunction of Judge Thompson to violate its tariff and accept shipments from the Viscose Company under class rates, while at the time in obedience to its tariff provisions it was declining such shipments when tendered by Cheney Brothers and the other parties to the New York case.

The decision of Judge Mayer was reversed by the Circuit Court of Appeals for the Second Circuit, Hough, C. J., dissenting (Cheney Brothers *vs.* Director General, 266 Fed. 310, 1920), and the Circuit Court of Appeals for the Third Circuit in the case at bar has certified the question of jurisdiction to this Court.

It was precisely distractions of this sort that were anticipated by this Court in the various cases which have sustained the exclusive jurisdiction of the Interstate Commerce Commission of issues of this character. And it was not alone

* See reference to action of District Court in Cheney Bros. *vs.* Director General, 266 Fed. 310 (1920).

the possibility of diverse verdicts of juries that was considered (Texas & Pacific Ry. *vs.* Abilene Oil Company, 204 U. S. 426, 1907), but the possibility of diverse views on the part of courts as to the appropriate regulations of the carriers (I. C. C. *vs.* I. C. R. Co., 215 U. S. 452, 1910; B. & O. R. R. Co. *vs.* U. S., 215 U. S. 481, 1910; Texas & Pacific R. Co. *vs.* American Tie Co., 234 U. S. 138, 1914).

If court jurisdiction should be sustained in this instance it is quite possible that divergent conclusions might again be reached by the courts in the different jurisdictions, and this brings the discussion to the fourth reason that demonstrates the exclusive authority of the Commission.

(4) The considerations which would operate to decide the issue are considerations properly cognizable only by the administrative tribunal.

If this issue were to be tried by the Court, what would be the test of the propriety of the rule challenged by the Viscose Company? Surely it will not be suggested that a carrier must transport every commodity. Obviously an express company could not be required to transport a harvesting machine. Nor is a railroad obligated to transport an elephant. It has long declined to transport in freight service bank bills, coin or currency, deeds, drafts, notes or valuable papers, jewelry, precious metals, or articles manufactured therefrom, or other articles of extraordinary value. Surely it cannot be said that, because it has transported a commodity, a carrier is forever bound to continue to transport it, irrespective of possible changes in transportation or other conditions. Necessarily, it must, subject to some principle, be able to define the class of articles it declines to carry, and be able to change this class from time to time as conditions change. Is not the governing principle that of reasonableness? And are not the considerations to determine whether or not the proposed change is reasonable considerations such as (*a*) the length of time the railroad has

transported the commodity in question, (*b*) the value of the commodity, (*c*) the facility with which it may be stolen, (*d*) the extent to which thefts have actually taken place, (*e*) the practicability of protecting it from theft, (*f*) the possibility of insuring the risk, (*g*) the availability of other means of transportation, &c., &c.

Consider the crystal-hard status of an injunction requiring for all times the inclusion of silk in the classification. Neither carrier nor Commission could ever change this.

It will hardly be denied that these and similar considerations are properly invoked to determine the reasonableness of the proposed change, and likewise it can hardly be denied that these considerations are properly addressed to an administrative tribunal rather than to a court.

This conclusion is emphasized when it is remembered that the Classification prescribes the *general* ratings and regulations governing the transportation of traffic, and that it is pre-eminently the province of the administrative tribunal to determine whether a given commodity or group of commodities can be regulated more effectively by the rates and regulations of specific tariffs, or by the ratings and regulations of a general tariff.

It is quite possible that in certain sections of the country the transportation of silk in freight service may be accomplished with reasonable safety, while in others—as for example, in the vicinity of great cities—it may be well-nigh impossible for the carriers to meet the hazard which inheres in the transportation of silk by freight. Obviously, it is an administrative question, for the Interstate Commerce Commission to determine, whether it is reasonable to include silk in the class of articles *generally* excluded from freight transportation, leaving its transportation by freight to depend on the special tariffs of the carriers. The same consideration applies to the contention of the Viscose Company, that its product is not of extraordinary value and differs in this regard from other silk, although similar to it in name and in other features.

And is it not entirely probable that a possible rate basis for the transportation of silk might be found in rates based

on valuation: Hart *vs.* P. R. R., 112 U. S. 331 (1884); Adams Express Co. *vs.* Croninger, 226 U. S. 491 (1913)? But such rates may be established only on property "concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property" (39 Stat. L. 441). No court could accord this remedy even if it should appear to be the correct solution of the question.

In like fashion, it is conceivable that under one set of circumstances the Commission might sanction a general rule and under another condemn it. It is difficult to conceive a case in which the controlling considerations more clearly demonstrate that the determining issue in the proceeding is essentially an issue for an administrative tribunal.

In the Puritan Coal Case, 237 U. S. 121 (1915), the Court delimited in a way instructive in the present connection the administrative field assigned to the Commission from the field of initial court authority. The action was for damages for failure to furnish coal cars. The complaint was not of discrimination in the car distribution rules but on account of non-observance of those rules to the disadvantage of the particular plaintiff. The Court at page 131 said:—

> "But it must be borne in mind that there are two forms of discrimination,—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission."

The District Judge in the case at bar was impressed by Railroad *vs.* Cook, 223 U. S. 70 (1912), but that case was

one in which the carriers had refused to obey their published tariffs and to carry liquor. This Court in deciding that the courts had jurisdiction in advance of the Interstate Commerce Commission expressly pointed out that "there was no tariff question." The case stands for the converse proposition, that the tariffs can be enforced by the courts, not that they can be changed or altered in respect of the classifications, rules and regulations affecting the rates and in respect of the rates themselves.

The distractions which would come from the courts, State and Federal, dealing with this subject are the same as those which induced the decision in R. Co. *vs.* Abilene Co., 204 U. S. 426 (1907). In denying the jurisdiction of the courts to consider reasonableness of rates the Supreme Court said that if the power existed in both the courts and the Commission to hear these complaints as an original matter "there might be a divergence between the action of the Commission and the decision of a Court;" and the Court added that "the established schedule might be found reasonable by the Commission * * * and unreasonable by a Court" thus producing a conflict. The cases are uniform that reasonableness is within the administrative function of the Commission in respect of tariffs and in respect of rules, regulations and classifications which are within the jurisdiction of the Commission under Section 15 of the Act:

I. C. C. *vs.* I. C. R. Co., 215 U. S. 452 (1910);
B. & O. R. Co. *vs.* U. S., 215 U. S. 481 (1910);
Robinson *vs.* B. & O., 222 U. S. 506 (1912);
Morrisdale Coal Co. *vs.* P. R. R., 230 U. S. 304 (1913);
Mitchell Coal Co. *vs.* P. R. R., 230 U. S. 247 (1913);
Texas & Pacific R. Co. *vs.* American Tie Co., 234 U. S. 138 (1914);
Loomis *vs.* L. V. R. R., 240 U. S. 43 (1916);
Wickwire Steel Co. *vs.* New York Cent. R. Co., 181 Fed. 316 (1910).

In Railway *vs.* American Tie Co., 234 U. S. 138 (1914),

a tariff had been published on lumber and the question was whether this tariff included railroad cross ties. The Court said:—

> "And it is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the courts may not, as an original question, exert authority over subjects which primarily come with the jurisdiction of the Commission."

It will doubtless be conceded that the office of assigning rate classes to particular articles is exclusively an administrative function of the Interstate Commerce Commission. Determining the reasonableness of rates is settled as an administrative function with which the Courts will not interfere. But Judge Ward in the Cheney case in the Circuit Court of Appeals for the Second Circuit, Cheney Bros. *vs.* Railroads, 266 Fed. 310 (1920), and Judge Thompson in the case at bar, Viscose Company *vs.* Director General, 263 Fed. 726 (1920), had the view that classification of certain articles *as for carriage* and of other articles *as not for carriage* by freight raises a question of law. Thus Judge Ward bases his decision upon the "elemental duty of the common carrier to accept and carry all goods usually carried" and upon the statement that "silk is a form of merchandise which has been carried by the companies for many years." Accordingly, he held that the complaint "is not of a question of rates, fares, charges, classifications, regulations or practices or changes therein, which would be an administrative subject within the cognizance of the" Commission "but a permanent prohibition of the carriage of silk at all, which is, we think, a judi-

cial question clearly within the cognizance of the courts." And Judge Thompson referring to the cancellation of ratings on silk declared that "plaintiff's product is not classified. It is excluded from classification" (263 Fed. 728). He also decided that if the carrier excluded a given article from the classification and the class rates then that exclusion would present a question of law for the courts.

Moreover, the District Judge in the case at bar assumes that Supplement No. 2, taking out the class rates on silk, thus in effect leaving the transportation of that commodity to commodity tariffs which the carriers might have on file or publish, was illegal, because the effect was "to exclude from transportation a commodity which has for years been accepted and recognized by the defendants as proper for transportation"—see opinion of Thompson, J., Viscose *vs.* Director General, 263 Fed. 726 (1920). Values change, conditions change, and with these changes come necessary alterations in the articles listed in the classification. Also mistakes are made in the exercise of carrier discretion and articles are put in a classification which subsequently have to be taken out as improper or unsafe for transportation by freight. Because an article has in the past been accepted for freight transportation is not conclusive of the eternal fitness of that article for freight transportation. The presumption of reasonableness arising from the voluntary continuance of a rate may be rebutted by the carrier: Green Bay Association *vs.* B. & O. R. R., 15 I. C. C. Rep. 59 (1909); Schoenhofen Co. *vs.* Railway, 17 I. C. C. Rep. 329 (1909). And long maintenance of rates does not prevent raising them: Southern Pacific Co. *vs.* I. C. C., 219 U. S. 433 (1911); nor does making low rates to encourage a business: L. & N. R. Co. *vs.* Finn, 235 U. S. 601 (1915).

Of the five Judges who rendered decisions in these two cases three have been of the opinion that the courts have initial jurisdiction and two were of the contrary opinion. The judges who entertained the view that the question is one of law thought that (as the matter was phrased by

Judge Ward) "a permanent prohibition of the carriage of silk at all" is "a judicial question clearly within the cognizance of the courts." If the question had been whether the carriers could reject and exclude diamonds from the freight classification and from carriage under the class rates would the courts be able to say as matter of law that this action on the part of the carriers was unreasonable? The difference between diamonds and silk and any other article is only a difference of degree. The facts in regard to the value and nature of the article and the transportation conditions at the time must be examined and considered in the light of evidence in order to determine whether carrier action in such a connection is reasonable. Uniformity of decision of all such questions of varying degree requires a single jurisdiction, the sole primary administrative jurisdiction of the Commission.

That the District Judge in the case at bar was undertaking the performance of an administrative function is emphasized by the length to which he found it necessary to go in formulating the injunction decree. The decree requires the carriers to accept from the plaintiff artificial or fibre silk for transportation under classification which existed prior to the effective date of said Supplement No. 2 to Consolidated Freight Classification No. 1, to wit, February 29th, 1920, or under such other classifications as may hereafter be legally put into effect under proper authority of law (Transcript, page 3). This last phrase has the affirmative effect of requiring the carriage of these articles under present and future classifications, and seems to exclude the possibility of the Interstate Commerce Commission ever exercising its function, after hearing, to order the carriers to publish joint rates and through routes for these articles by a commodity tariff: see Section 15 of Commerce Act. As in a number of the cases which have reached this Court, the practical effect of the injunction order is to determine a rate matter and exclude the Commission. And the effect of the injunction order was to restrain the operation of a document filed with the Commission as part of the classification and rules and to reinstate class rates by injunction.

The difficulty which is here encountered is sought to be met by the appellee by urging that Supplement No. 2 never became effective February 29th, 1920, owing to the issuance of the restraining order on February 26th, 1920, because that order enjoined the defendants (including the Director General) from putting the Supplement in effect. But no act of the Director General or of any of the other defendants was needed to put the tariff in effect. Supplement No. 2 having been filed on January 28th, 1920, became effective by operation of law on the date named therein without any subsequent or intervening act on the part of any one of the parties thereto. Furthermore, the courts are without jurisdiction to prevent tariffs so filed from becoming effective on the dates specified, since the provisions of the law are mandatory in this regard and operate to make them effective irrespective of any action of any court or any party to the tariff, classification or regulation: Wickwire Steel Co. *vs.* Railroad Co., *supra.*

It should not be forgotten that Supplement No. 2 not only included silk in the list of prohibited articles but eliminated all classification ratings on the commodity so that after February 29th, 1920, no class rates were lawfully in effect for the transportation of these goods. It was, therefore, unlawful for the carriers to transport them under class rates, since Section 6 of the Act to Regulate Commerce, which forbids a carrier to engage or participate in the transportation of property unless rates therefor have been filed and published. And the injunction of the District Court operates to require disobedience of the mandate of Congress.

B. The same conclusions result from the fact that the action of the carriers complained of constituted a classification or regulation initiated by the Director General of Railroads.

The same conclusions follow from paragraphs 2 and 3 of Section 10 of the Federal Control Act of March 21st, 1918, (40 St. L. 451) which reads as follows:—

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission, shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition."

Here again, as in the Commerce Act, the question of the reasonableness and justice of classifications and regulations is confided to the Interstate Commerce Commission.

Since the classification or regulation involved in this proceeding was established by the Director General, and since his power so exerted was Presidential power, the action taken by him constitutes an order of the President within the meaning of Section 10. It is reviewable, therefore, only in the manner provided in the Act itself, namely, before the Interstate Commerce Commission. And this is in accord with the settled principle that executive discretion cannot be controlled by the courts: Marbury *vs.* Madison, 1 Cranch, 137

(1803). The Wickwire case, *supra*, denied court jurisdiction in a case where the Commission had no power to suspend and the injunction was sought after publication but before the rate was effective.

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No. 424. October Term, 1920

IN THE

Supreme Court of the United States

DIRECTOR GENERAL OF RAILROADS, et al.,

vs.

THE VISCOSE COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief of the Viscose Company,

Appellee.

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November, 1920.

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BRIEF OF THE VISCOSE COMPANY, APPELLEE.

I. STATEMENT OF THE CASE.

This case arises out of the act of the United States Railroad Administration in publishing Supplement No. 2 to Consolidated Freight Classification No. 1, cancelling items relating to silk, natural and artificial, as contained in Consolidated Freight Classification No. 1 and amending Rule 3 of said classification to include the commodity of silk, natural and artificial, in the list of commodities that will not be accepted for shipment. This supplement was published under Freight Rate Authority No. 21474, corrected, as issued by the United States Railroad Administration, Direc-

tor-General of Railroads on January 21, 1920, which reads as follows:

"This will authorize, effective on thirty days notice, amendment to Consolidated Freight Classification No. 1 to cancel the ratings on silk provided for in Items 32, 33 and 34, page 363 and to amend Rule 3 of said Classification to include the same articles in the list of commodities that will not be accepted for shipment."

Pursuant to this Freight Rate Authority there was published June 28, 1920, to become effective February 29, 1920, the last day of Federal Control, said supplement No. 2 to Consolidated Freight Classification No. 1, which at page 36, did cancel the items mentioned in the Freight Rate Authority, being the only items in said Consolidated Freight Classification No. 1, providing for the transportation of silk, and Rule 3, of the said Classification was also amended to include silk in the list of commodities that will not be accepted for shipment

The result of the supplement was to deny transportation by freight to 80 per cent. of the production of the Viscose Co. in Interstate Commerce, thereby causing a great and irreparable damage in the loss of gross sales of approximately $246,000 per day. (Abstract of Record, p. 3.)

At the time that this supplement, by its publication, was to become effective the Federal Control Act approved March 21, 1918, 40 Stat. L. 451, was in effect, and which in Section 10 provided, "that during the period of Federal Control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations and practices by filing the same with Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations and practices shall not be sus-

pended by the commission pending final determination."

There was at this time also before Congress the consideration of an Act to provide for the return of carriers to private operation, which was approved February 28, 1920, 41 Stat. L. 456, commonly known as the Transportation Act 1920, which act, by section 208 (a) provided "all rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part of the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classifications, regulations, or practices shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

Faced with this condition of the law and the fact that the Freight Rate Authority itself prescribed that silk was to be included in the list of commodities that would not be accepted for shipment and in view of the great and irreparable damage to the Viscose Company resulting from this exclusion of 80 per cent. of its production from rail transportation, application was made to the District Court for the Eastern District of Pennsylvania for a restraining order which was granted on February 26, 1920, the date of the application therefor. On argument for preliminary injunction, the Court handed down the opinion granting a preliminary injunction against the Director-General of Railroads, The Pennsylvania Railroad Co., and Norfolk and Western Railway Co., upon answer filed

the injunction was made permanent. From this decision the then defendants appealed to the United States Circuit Court for the Third Circuit, which Court certified the question upon which the present argument is based. The Circuit Court for the Second Circuit having previously, in Cheney Brothers vs. Railroads, 266 Fed. 310 (1920) having ordered the granting of an injunction restraining the enforcement of supplement No. 2.

II. ARGUMENT

(1) Freight Classification

That there may be no uncertainty as to the issue in this case it is important to understand the necessity and function of freight classification.

Section 1 of the Act to Regulate Commerce, 36 Stat. L. 539, provides, "And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe and enforce just and reasonable classification of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classification, rates, or tariffs, * * *" and further provides, "That every such unjust and unreasonable classification, regulation and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful." And substantially the same provision has been carried into the Act, as amended by the Transportation Act 1920, 41 Stat. L. 456, as paragraph 9, Section 1, thereof.

By this provision of the law it is the duty of every carrier subject to the provisions of the law to observe and enforce classification of goods with reference to

which rates, tariffs, regulations or practices are or may be made or prescribed.

The law, therefore, makes the basis of rates, tariffs, regulations or practices the classification of the goods.

Classification of goods is mandatory under the law.

As classification by law is made the basis of rates and practices, so in practice is the classification the basis of rate construction.

The present Consolidated Freight Classification, No. 1, is merely the consolidating of the three freight classifications which theretofore were published in the recognized classification territories of the country, to wit, Official, Southern, and Western Classification Territories.

As appears by the classification itself it is participated in by the railroads throughout the United States.

Briefly, the freight classification contains, first: An index of all commodities carried by freight; second: The rules and regulations applying to the acceptance, carriage and delivery of freight; and third: The description and rating of the commodity or refers to the tariffs applicable thereto.

The use of the freight classification in practice may be briefly described as the index from which the commodity and the conditions under which it is accepted and carried, its description and the ratings applying to it are ascertained. When a rate is desired to be known on any particular commodity the index to the freight classification is consulted. From this index a reference is made to the page containing the items by number relating to the commodity directly or by analogy if it is one carried as freight. Unless such a direct or analogous description can be found in the clas-

sification there is no manner of ascertaining the rate to be applied for the transportation of the commodity, and in fact no rate would be in effect for the carriage of the commodity unless it was in the index or under the items of description directly or by analogy.

It is important to note Exhibit A (Trans., page 4), which is typical of the freight classification, where there appears, first, upon the page the item number, second; under articles, a description of the articles and third: ratings applying in the three classification territories.

If the particular item and description has applied to it a rating, the rate applicable to that particular commodity may be ascertained by finding the class rate in effect as published in the tariffs between the points over the route that the shipment is desired to be moved. It may be, however, that the commodity has been given a rate lower than the general structure of class rates in which instance under ratings it will be noted, as for example in the case of coal, Anthracite, at page 129, Item 2, of Consolidated Freight Classification No. 1, "In packages or in bulk C. L. Min. Wt. 40000 lbs.," as indicated by symbols in official Classification territory it is "subject to rates and regulations of individual carriers."

The Act to Regulate Commerce makes no distinction between class rates and commodity rates and in fact nowhere in the Act is either character of rates referred to or prescribed. However, in the construction of rates the carriers of their own initiative or under orders of the Interstate Commerce Commission or of the various State Commissions have given to the particular commodity a rate either on the basis of the class rates or on a basis lower than the class rates, which for the purpose of distinguishing them have been termed commodity rates. The test in fixing those

extreme limit of the powers of the Director-General, the inquiry of the Court should be as to the Act of Congress and order of the President made in pursuance thereof, its purpose and intention and be supposed that the language of Congress was used in accordance with common understanding.

Union Pacific R. R. vs. Hall, 91 U. S. 343 (1875).

Subsequent to the proclamation of the President, Congress by the Act of Congress, known as "Federal Control Act," approved March 21st, 1918, 40 Stat. L. 451, provided specifically for carrying into effect, the provisions of the Act of 1916, and from the language of that Act, it is clear that it was the intention of Congress to preserve the duty of Common Carriers to the Public for in Section No. 10 it is provided that "in any action at law or suit in equity against the carrier no defence shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the Federal Government."

Section 10 in full is as follows:

> Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable

prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be re-transferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing, concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the commission may make

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such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

By the very wording of Supplement No. 2, there is no claim for its publication as a War emergency. No reading of the Acts or Power of Attorney conferring power upon the Director-General can construe such as a lawful reason for failure to operate Carriers for the Public interest and to perform the duties which devolve upon them under the Act to Regulate Commerce. It is certain that the power given to the Director-General must be strictly construed and that he has no power beyond that specifically given to him.

It appears without necessity of testimony, that the supplement was made to become effective on February 29, 1920, the last day of Federal Control and that by the Transportation Act 1920, the control of the President as to rates, fares, charges, classification, regulations and practices terminated at 12.01 A. M., March 1st, 1920.

In *School of Magnetic Healing vs. McAnnulty,* 187 U. S. 94, the Supreme Court sustained an injunction

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against the Postmaster-General, restraining him from refusing to deliver mail for plaintiff. Under the statute (quoted at page 100) placed the discretion solely in the Postmaster. The Court said (page 108):

> "That the conduct of the Post Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of the department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."

(Page 109):

> "Here it is contended that the Postmaster-General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exist, then he cannot exclude or refuse to deliver them."

(Page 110):

> "In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster-General in directing the defendant to retain and refuse to deliver letters addressed to them. The Postmaster-General's order being the result of a mistaken view of the law could not operate as a defence to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case, as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from

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Hearings were held at Boston, Mass., New York, N. Y., Chicago, Ill., Omaha, Nebr., Portland, Ore., San Francisco, Calif., Denver, Col., Fort Worth, Tex., New Orleans, La., Atlanta, Ga., and Washington, D. C. Nearly 15,000 pages of testimony were taken and over 800 exhibits were filed. * * *

As we understand it, the consolidated classification was proposed as a general standard classification to supersede not only the existing issues of the official, southern, and western classifications, but also all state classifications, and at the request of the director of traffic we have received evidence as to the general effect of canceling the various state classifications."

Rule 3, is given special consideration at page 19, as follows:

"Rule 3, which contains a list of several articles of extraordinary value that will not be accepted for transportation by freight, including money, stamps, valuable papers, etc., proposes that articles with postage stamps affixed will not be accepted. * * *

We recommend the proposed rule."

Attention is directed to the fact that in this comprehensive study of classifications Rule 3 was not enlarged to cover any commodities of freight nor such as could clearly be classified as goods and merchandise. In fact the articles included under the rule have repeatedly been distinguished from goods and merchandise by the Courts.

"The term 'merchandise' is usually, if not universally, limited to things, that are ordinarily bought and sold, or are ordinarily the subjects of commerce and traffic; and is never applied to choses in action, as bank bills really are. * * * * In short, the term 'merchandise' is usually applied to specific articles, having a sensible, intrin-

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sic value, bulk, weight, or measure in themselves, and not merely evidences of value, such as notes, bills of exchange, checks, policies of insurance, and bills of lading. In the case of Sewall v. Allen, 6 Wend., 335, the court of errors held that a steamboat charter authorizing the company to transport goods, wares and merchandises, did not necessarily or naturally include the carriage of bank bills, so that, unless the Company actually made that a part of their ordinary business of common carriers, they were not liable for any loss thereof."

Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16 (1841).

It is important as bearing upon the revolutionary and arbitrary action here complained against to note the items relating to silk in the appendix to the report of the Commission at page 528, and to compare them with the items in "Consolidated Freight Classification No. 1," as filed as a tariff, as appears in Exhibit A, (Trans., page 4).

It will be observed that the report of the commission is dated July 3, 1919, and that the tariff was issued December 10, 1919. Between those dates it is apparent further consideration was given to the items relating to silk, for it will be seen that the clauses relating to released value have been made uniform in all three Classification territories.

If the Railroad Administration, in the exhaustive study it made of classification and of these particular items up to December 10, 1919, could not find the exclusion of silk necessary for "the transfer or transportation of troops, War Material and Equipment or for such other purposes connected with the emergency," it is certainly within the function of the Federal Courts to determine as to whether such necessity ex-

isted on and after February 29, 1920. Especially is this true when the act of a subordinate officer affected the sanctity of the constitutional rights of appellee with respect to the obligation of contracts and right to property.

But it is submitted that the Director-General of Railroads had no greater power to deny the duties encumbent upon common carriers than the carriers had under private control.

Of the same opinion was the Court of the Second Circuit, which said (Cheney Brothers vs. Director-General, et al., 266 Fed. 310 (1920): "It will be seen from the above powers (quoting Sec. 10, Federal Control Act) of the Director-General are the same as those of the carriers except that rates fixed by him are to be treated with a little more ceremony than the rates fixed by the carriers. For the purposes of this case the powers are the same."

The withdrawal of silk from the classification was an unlawful Act.

The District Court, in the opinion of Thompson, J., in Viscose Co. vs. Director-General, et. al, 263 Fed. 726 (1920) out of which the case now in argument arises, summarizes the facts and properly applies the law in the following language (Rec. p. 40):

> "An examination of the facts makes it apparent that what the defendants have done is not to establish a classification of the plaintiff's property for transportation with reference to which rates may be prescribed, nor has it done anything required by the Act relating to or connected with the receiving, handling, transporting, sorting or delivery of the plaintiff's property. Prior to January 28th, 1920, the defendants complied with the requirements of the Act by having on file schedules of classification and rates for the transportation

of the plaintiff's product, but on that date they withdrew the plaintiff's product from classification so that so far as it was concerned there was no longer established for it any classification for transportation with reference to which rates might be prescribed. The plaintiff's product is not classified. It is excluded from classification. It is not the subject of a tariff rate. It is excluded from transportation and no questions of just and reasonable rates, charges, classifications, regulations or practices connected with transportation arise. The result of putting into effect the cancellation order is to deprive the plaintiff of its rights as a manufacturer and seller to ship and transport its commodity, a right which it has exercised without question since 1910. If a carrier may after, without question, having accepted a commodity for transportation for such a period, after a manufacturing plant has been located upon its line, after the business has grown and prospered, after, in reliance upon continuing to obtain transportation, large expenditures have been made for the building of housing for its workers, exclude it absolutely from transportation, it involves confiscation rather than classification. But the defendants contend that they may do this and that only the determination by the Interstate Commerce Commission that it is unjust and unreasonable will prevent the plaintiff having its transportation rights taken away from it. How can there be any question for the Commission to decide? Can the Commission say it is a just and reasonable regulation which deprives the plaintiff of the right of transportation of its property?"

The first evidence of any intention on the part of the Railroad Administration to make any change with

respect to this commodity is contained in Freight Rate Authority No. 21474, corrected, Exhibit B, (Trans., page 5), whereby silk was to be cancelled from the Consolidated Freight Classification and included in the list of commodities that would not be accepted for shipment.

This was the authority issued by the Railroad Administration to permit the placing in effect of the Supplement working such cancellation of descriptions and ratings on artificial silk, as contained in previous issues of freight classifications of the individual carriers prior to Federal Control and continued in effect under Federal Control (Trans., Page 1).

This Freight Rate Authority is important to this case because it removes the necessity for determining the construction to be placed upon the effect of Supplement No. 2 to Consolidated Freight Classification No. 1 because it in itself states that silk is to be included in the list of commodities that will not be accepted for shipment after the amendment to Consolidated Freight Classification No. 1.

By the statement of the question as certified (Trans., page 2) the Supplement at page 36, Items 5 and 6, cancelled the Items and ratings shown under said Items 31, 32, 33 and 34, page 363 of said Consolidated Freight Classification No. 1 relating to silk, artificial or natural and at page 17, amended Rule 3, of said Classification, so as to include silk, artificial or natural, as described in the said items in said classification.

"The change produced by the amendment consisted in the addition to the list of prohibited articles of silk, artificial or natural (Trans., page 2)."

Therefore the effect of the supplement was to remove from the classification both by description and

rating all items relating to silk, artificial or natural, and, in addition to prohibit its acceptance for shipment as freight.

"The carriage of which as freight was sought to be precluded by the provisions of said Rule 1 (evidently intended to be Rule 3) of Supplement 2, Consolidated Freight Classification No. 1, as amended."

Appellants Motion to Advance, page 5.

(3) Duty to Receive and Transport.

The underlying question in issue here is the lawfulness of the refusal to receive and transport a commodity through the withdrawal of it from classification and placing it under the list of commodities which will not be accepted for transportation.

In order to consider whether this is lawful, it is necessary to determine first the duty of common carriers by railroad to accept and transport at common law and secondly the statutory duty in this regard.

a. At Common Law.

"Railroads may properly be termed public highways, whether supported by the Government itself or by the agency of corporations or individuals under legislation."

Olcott vs. The Supervisors, 16 Wall. (U. S.) 678 (1872).

33 Cyc. 37.

Cherokee Nation vs. So. Kan. R. Co., 135 U. S. 641 (1890).

"It is the common law duty of a common carrier, in being tendered a reasonable compensation, to receive at reasonable times and carry all goods offered to it for transportation within the line of its business, or of the kind which it undertakes to transport."

1 Moore on Carriers, Second Ed., 116.

Platt vs. Lecocq 158 Fed. 723 (1907).

N. J. Steam Nav. Co. vs. Merchants' Bnk., 6 How. (U. S.) 344 (1848).

Standard Lime & Stone Co. vs. Cumb. Val R. Co., 15 I. C. C. 622 (1909).

"The rule broadly stated is, that in the absence of the existence of an exceptional cause, such as the act of God, public enemy, unavoidable accident, or an abnormal and unanticipated rush of business which will prevent the performance of its common law duty to shippers, a common carrier has no right to refuse to receive and transport property offered for shipment when such property is in good condition and properly prepared for shipment and belongs to a class of property subject to carriage by such carriers."

1 Michie on Carriers 208.

A common carrier for hire must carry all goods tendered for carriage properly packed, etc., in accordance with requirements of law, unless it may excuse itself on some ground of positive law.

Royal Brewing Co. vs. Mc. K. & T. Ry. Co., 217 Fed. 146 (1914).

As the duties of common carriers are imposed by law they are not at liberty to arbitrarily refuse to carry.

York Co. vs. Central R. Co., 3 Wall. (U. S.) 107 (1865).

Common carriers are bound to accept property of kind they undertake to carry.

4 Elliott on Railroads, paragraph 1392.

By virtue of the character of railroads as common carriers of goods, they are under a general duty to receive and carry, when properly offered, all goods of the kind they undertake or assume to transport.

4 Elliott on Railroads, par. 1465.

N. J. & C. Co. vs. Merchants' Bnk. 6 How. 344 (1848).

The railroads of the country have heretofore held themselves out as willing and ready to receive and transport artificial silk as a proper commodity of freight transportation through their acceptance of it from the appellee since 1910 (See opinion Thompson J., Supra).

> "The word 'goods,' when used in defining his business, must be interpreted to mean such things as from usage and custom, his mode of conveyance; his public professions; the character of his particular trade or the manner of conducting it; he is to be fairly understood as holding himself out to the public as ready to carry for hire."
>
> Hutchinson on Railroads, 3rd Ed., par. 90.

After it is made to appear that the goods were of the kind usually carried, or which by public profession the carrier was bound to accept for that purpose, the law will only impose obligation, in this respect, co-extensive with the public expectations created by the course of business or the invitations publically held out to those who may solicit the carriers' business. It may also be shown, from usages of those similarly engaged, or from previous practice or course of business of the particular carrier, that the duty to accept was incumbent upon it.

Hutchinson on Railroads, 3rd Ed., par. 144.

From the facts in this case it is clear that the business of appellee has been built up upon the holding out and public invitation by the carriers of the country to accept its commodity for transportation, to such an extent that 80 per cent. of its production and distribution is now dependent upon the course of dealing of the rail carriers in accepting artificial silk and transporting it to destination (Trans., page 3. Opinion Thompson, J., Supra.).

> "It is the elemental duty of the common carrier to accept and carry all goods usually carried."

Cheney Brothers, et al., vs. Director-General, et al., opinion of Circuit Court of Appeals, Second District, decided March 31, 1920, supra, under the same facts.

It is elemental that the carriers having placed silk in the class of goods acceptable as freight which they were ready and willing to carry could not, at common law, refuse to continue to receive and transport it. And the Court in the above opinion ruled that "silk is a form of merchandise which has been carried by the companies for many years."

b. By Statute.

The Act of Congress, approved February 4, 1887, commonly known as the Act to Regulate Commerce, and the various Acts amendatory thereto and supplementary thereof, did not abridge the common law duty of carriers.

I. C. C. vs. L. & N. R. R., 73 Fed. 409 (1896).
Memphis Hay & Grain Assn. vs. S. T. L. & S. F. R. Co., 24 I. C. C. 609 (1912).

These acts in effect have only emphasized the duties existing at common law.

Section 1, of the Act to Regulate Commerce, reaffirmed in Sec. 400, of the Transportation Act of 1920, provides:

> "It shall be the duty of every common carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor * * * * And it is hereby made the duty of all common carriers subject to the provisions of the Act to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed and just and reasonable regulations and practices affecting classifications, rates or

tariffs * * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property, subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful."

And by Sec. 6, it is required that every common carrier shall file and keep open to public inspection schedules which shall contain "the classification of freight in force."

This was the law in effect on January 28, 1920, the date of issuing and on February 29, 1920, the date it was proposed to make effective "Supplement No. 2, to Consolidated Freight Classification No. 1," whereby all classifications for the transportation of silk were proposed to be withdrawn and the commodity placed under the list denied transportation.

"Classification is the foundation of all rate making."

1 I. C. C. Annual Rep. 303 (1887).

"The making of a freight classification is a great public function."

In re Suspension of Western Classification, 25 I. C. C. 442, 450 (1912).

It was therefore the statutory duty of the carriers to provide and maintain a classification providing for the transportation of silk as a commodity of freight.

The Freight Rate Authority issued by the Railroad Administration under the Director-General of Railroads, one of appellants, authorizing the filing of

Supplement No. 2 clearly states that it is for the purpose of cancelling the ratings on silk provided for in items of the Classification and to amend Rule 3 of the Classification to include silk in the list of commodities that will not be accepted for shipment. (Trans. page 2.)

This leaves no question of interpretation or construction of the effect of Supplement No. 2, upon Consolidated Classification No. 1.

The appellants have said that silk will be given no classification and will not be accepted for shipment.

They have said they will not perform their common law duty in respect to this commodity and that they will not perform their statutory duties by giving it a classification.

They have removed the question from a consideration of their statutory duty to "establish, observe and enforce *just and reasonable* classifications."

They have reduced the question to the simple proposition of the lawfulness of their act in refusing to provide any classification for silk and to carry it as a commodity of freight.

This is a question solely of the duty of a common carrier under the law, primarily and exclusively for determination by the Courts.

The imposition by Commissions of a rate, regulation, practice or classification which would deprive a carrier of its business and properties has been held to be unlawful.

Smith vs. Ames, 169 U. S. 466 (1898).

Is a shipper to be denied the jurisdiction of the Courts where the Act of the carrier would deprive him of his business and property?

The case of *L. & N. R. R. Co. vs. Cooke Brewing Co.*, 223 U. S. 70 (1912), cited in the opinion of the court below, is controlling in this case. The language of the Supreme Court is particularly pertinent, as shown by the following abstract:

> "The announced purpose of the railroad company to abjure its functions and duty as a common carrier in respect to interstate shipments of all intoxicating liquors to localities in the State of Kentucky, where the Kentucky local option prohibition laws prevailed, threatened the ruin of complainant's business, and relief by injunction against such continued course of conduct was certainly one which in such circumstances might be granted. Where the case is one in which, under any circumstances, relief in equity may be admissible, it is too late to say there was an adequate remedy at law only upon review proceedings. Kilbourn vs. Sunderland, 130 U. S. 505" (at page 81).
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> "The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is incidentally stated in the answer of the company, and this fact is now made the basis of an argument that neither the state court nor the Circuit Court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an order requiring the railroad company to desist from refusing to transport such articles in interstate commerce" (page 83).

How precisely similar to the argument and the contentions of the appellants here made. But the Court answered (page 83):

> "Why should the brewing company have made a complaint to the Commission—What relief could it afford? * * * There was no claim the commodities tendered were inherently dangerous to

> transport or that the railroad did not have the transportation facilities. * * * To say there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce is to reason in a circle for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or question of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body."

It also distinguishes *Texas and Pacific Railway vs. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), upon which it is anticipated appellants will lean heavily as they did in the Court below, as one relating solely to a question of the reasonableness of a rate. Here there can be no question of the reasonableness of the rate or classification because the purpose was to withdraw the classification. There would have been nothing before the commission to consider as an administrative question.

> "What is complained of is not a question of rates, charges, classifications, regulations or practices or changes therein, which would be an administrative subject within the cognizance of the Interstate Commerce Commission but is, not merely a temporary embargo, but a permanent prohibition of the carriage of silk at all, which is, we think, a judicial question clearly within the cognizance of the Courts."

Cheney Bros. et al., vs. Director-General, et al., 266 Fed. 310 (1920).

(4) JURISDICTION.

a. Courts or Commission?

The whole appeal of appellants is that the proceedings have been brought in the wrong forum.

It is insisted that the matter should have been proceeded with by petition to the Interstate Commerce Commission

To what effect?

By Secton 10, of the Federal Control Act, the Director-General could have, as he did in many instances, put the Supplement into effect upon one day's notice. By the same section the Supplement could not have been suspended by the Director. Under Section 208 (a) of the Transportation Act of 1920, prior to September 1, 1920, no rates, fares, classifications, etc., so filed could be suspended by the Commission pending final determination. To obtain a final determination by the Commission would have required at least six months—six months denial of transportation to 80% of appellee's production and loss in sales of $246,000.00 per day.

Why a Court of Equity?

Could anything more forcibly demonstrate the necessity for the jurisdiction of the courts in safeguarding the rights to property?

Of course the courts are open and have primary jurisdiction to determine the lawfulness of the attempt to exercise any such abnormal power.

For if the power existed as to silk, it existed as to wheat, meat, food stuffs or any other commodity.

The intent of Congress in permitting a federal control of railroads did not contemplate the placing of

the control of the whole of the country's industries in the hands of one individual with power to destroy it.

Appellants can sustain their contention only upon the assumption that there was some administrative questions left for the Commission to pass upon.

But there was no administration question. The question involved only the lawfulness of the act of denying transportation to goods—necessitating interpretation of the Act to Regulate Commerce, the Federal Control Act and the common law duty of carriers.

L. & N. R. R. Co. vs. Cooke Brewing Co., supra.

b. Over Acts of Director-General.

The prior discussion of jurisdiction has been primarily based upon acts of common carriers.

It is earnestly submitted that the Director-General was bound by the same duties as were the carriers when he assumed control.

That the limit of his powers and the intent of Congress in giving federal control of the transportation system of the country may be clear the Acts and proclamation giving authority, so far as pertinent, are here abstracted.

> "The President in time of War, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation or any part thereof, and to utilize the same to the exclusion so far as may be necessary of all other traffic thereon for the transfer or transportation of troops, War Material and Equipment or for such other purposes connected with the emergency as may be needful or desirable."
>
> Sec. 1, 39 Statutes at large, Chapter 418.

Assuming authority thereunder, the President, by

his Proclamation of December 28th, 1917, took over the Transportation systems of the ountry and conferred their operation upon Wm. C. McAdoo, the then Secretary of Treasury, with the following words of limitation, to wit:

> "To the end that such systems of transportation be utilized for the transfer or transportation of troops, War Material, and Equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the National interest may require *and all the usual and ordinary business and duties of Common Carriers.*"

Thus clearly, the Director-General, then appointed, who was succeeded by the appellant, Walker D. Hines, as Director-General, could have no greater power than conferred upon him by this proclamation which in effect was a Power of Attorney and which Power of Attorney could not have been in excess of the powers conferred upon the President through the section of the act above quoted.

It is clear that both the act and the Proclamation divided his powers into War time and Non-War time powers. While technically there may be still existing a state of war yet it is patent that the issuing of Supplements No. 2 was not necessary for the movement of troops, munitions or any other emergency.

At the time of issuing the said supplement, such War time necessities had passed and the power of the Director-Genral was therefore, by his appointment, limited to the utilization of such systems for the usual and ordinary business and duties of common carriers. In construing this act and proclamation, which is the

rates under the duty as prescribed by the Act has been their reasonableness, but in no instance is the commodity excluded from the Classification.

It would be a practical impossibility for a carrier to quote rates on the great number of commodities, subject to transportation by freight, without a general index of commodities. It must also be remembered that the Act to Regulate Commerce through its requirements of publication of tariffs was designed to give others than railroad officials themselves the right to ascertain the rate applying to a commodity. To the shipper therefore, seeking to ascertain the rate upon a particular commodity an index of all commodities carried is an absolute necessity in the ascertainment of the rate applicable to the particular commodity.

It is also important to note that reference to the classification must be had to ascertain the terms, conditions, rules and requirements under which the commodity will be accepted for carriage.

Supplement No. 2 to Consolidated Freight Classification No. 1, as appears on page 36 thereof, effective February 29, 1920, "Cancels items 31, 32, 33 and 34, page 363 of Classification," the only items whereby the Viscose Company was enabled to have its commodity of artificial silk transported.

Page 17, of the same supplement No. 2, effective February 29, 1920, cancels Rule 3, page 3, of the Classification, and restates the rule to include, silk, artificial, or natural, raw, spun, schappe, or thrown, including organzines, singles, tram or yarns, which were the only descriptions under the items referred to whereby the Viscose Company could have its commodity transported as freight. This rule provides that unless otherwise provided the property specified in the rule would not be accepted for shipment.

Section 1 of the Act to Regulate Commerce made it the duty of every carrier subject to the provisions of the Act "To establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein and for the operation of such routes and providing for reasonable compensation to those entitled thereto."

The Interstate Commerce Act as amended by the Transportation Act 1920 includes the same provisions under paragraph 4, Section 1, and adds "and in case of joint rates, fares or charges to establish just, reasonable and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

It is therefore clear that it is the duty of a carrier not only to provide for the transportation of goods over its own line, but in line with its public duty to participate in through routes and joint rates so that the production of the country may be moved in Interstate Commerce. Therefore if the rules of the classification, whereby such through routes and joint rates must necessarily be governed, excludes a commodity from shipment it would be deprived of the right to classification and shipment by through routes and under joint rates. It must be remembered, however, that the law makes it the duty to provide such through routes and joint rates and also that the classification of property must be observed with reference to which such tariffs, regulations or practices are or may be made or prescribed.

To permit the individual roads to pass upon a commodity without reference to one another would be a

disobedience of the duty imposed upon each by the Act to participate in through routes and joint rates. Further it would be permitting the carriers of the country to regulate industry.

(2) Consolidated Freight Classification No. 1.

As stated in the Transcript, page 2, "Artificial silk had been recognized, accepted and carried by the railroads of the United States for a long term of years and had never been refused transportation as freight."

The specific ratings now attempted to be withdrawn from the classifications have been held to be reasonable by the Interstate Commerce Commission.

In *Silk Assn. vs. P. R. R., et al.*, 50 I. C. C. 50, decided May 9, 1918, the Commission approved the report of the examiner, which in part was as follows:

> "For many years prior to June 2, 1915, the official classification rating of raw, thrown or spun silk, in less than carload quantities, was first class when the value of the silk was released to $1.00 per pound and three times first class when the value was not so released. Upon the passage of the first Cummins amendment, the first class rating was limited to silk not exceeding $1.00 per pound in value, while a rating of one and one-half times first class was established on silk exceeding that value. The new ratings were attacked in Silk Association of America vs. P. R. R. Co., 44 I. C. C. 578, but were not found to be unreasonable or unjustly discriminatory."

At page 52 the examiner set forth the items of the "official classification," relating to silk, as it then existed which when compared with the Items in "Consolidated Freight Classification No. 1" (Exhibit A,

Trans., page 4) will be found to be substantially the same.

The care with which "Consolidated Freight Classification No. 1" was prepared by the Railroad Administration, appears from the following extracts from the report of the Interstate Commerce Commission, In re Consolidated Freight Classification Case, 54 I. C. C. I. at pages 1 and 2:

> "The director of traffic of the Railroad Administration, after conference with us, appointed a special committee of experienced classification men to carry out the work we had in mind. This committee prepared and submitted a volume entitled 'Proposed Consolidated Freight Classification No. 1,' which accomplishes the consolidation and uniformity sought, and, in addition thereto, proposes many increases and reductions in ratings, most of which, however, have no necessary connection with the work assigned to the committee. The volume was not filed with us as a tariff schedule.
>
> The Director-General requested that we make an investigation and give him our recommendations relative to the advisability of adopting it for application by carriers under federal control. We accordingly instituted this proceeding of inquiry and investigation into the reasonableness and propriety of its provisions. We made respondents all of the carriers subject to the act and which were not under federal control, in order that the same classification might, if that course were found advisable, be prescribed for their use also. The special committee distributed about 14,000 copies of the volume among carriers, state commissions, interested shippers and shippers' organizations throughout the country, each copy accompanied by a notice of this proceeding.

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complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster-General had jurisdiction over the subject-matter(assuming the validity of the Acts) and therefore it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute, yet such decision being a legal error does not bind the courts."

The Supreme Court has decided that the Acts of the Director-General may be restrained by the Courts.

In *Northern Pac. Ry. Co. vs. Director-General et al.*, 251 U. S. 326, decided June 3, 1919, the Court held in passing upon the question of the fixing by the Director-General of intrastate rates upon a basis different from that fixed by State statute, as follows:

"The principle of these cases, however, can only be applicable by giving effect to the conclusion we have reached as to the legality of the acts of the officers which were complained of, and to decide which question the United States was not a necessary party. This is undoubtedly true unless it can be said that the contention concerning the want of power in the officers were so unsubstantial and frivolous as to afford no basis for the jurisdiction, and hence caused the suit to be from the beginning directly against the United States. As, however, we are of the opinion that there is no ground for that view, it follows that the case as made gave jurisdiction to dispose of the question of wrong committed by the officials and that a decree giving effect to our conclusion on that subject will dispose of the entire case.

Our decree, therfore, must be and it is; Reverse and remanded for further proceedings not inconsistent with this opinion."

Again the jurisdiction of the courts is open in aid of law and order in determining whether the Director-

General exceeded his authority as conferred by law. Surely it cannot be contended that the Commission would have power to pass upon this question.

The denial of duty and the present status comes about solely through the procedure of the United States Railroad Administration.

It was under its jurisdiction that the Supplement was filed.

Judge Thompson issued his restraining order on February 26, 1920, restraining appellants, including the Director-General from putting into effect and enforcing the provisions of Supplement No. 2, as it related to Artificial silk.

It is only because the Director-General ignored the order of the Court that any controversy has arisen.

He did permit it to go into effect and be enforced on February 29, 1920.

He had the power to cancel the Supplement upon such notice as he saw fit, under Sec. 10 of the Federal Control Act.

The issue as raised in this case by the carriers is substantially the same as that raised in the case of *Skinner and Eddy, Corp., vs. U. S.*, 49 U. S. 557 (1919), and the language of Brandeis, J., at page 562, is decisive of the issue in the case at bar. The language referred to is as follows:

"The defendants contend that the District Court did not have jurisdiction of the subject matter of this suit, because orders entered in a fourth section proceeding cannot be assailed in the courts, at least not until after a remedy has been shown under Sections 13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust

because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission; and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law. But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory power; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. The District Court properly assumed jurisdiction of this suit."

The carriers and Railroad Administration have sought by way of justification to contend that the question here is the reasonableness of a classification, and that resort should have first been made to the Commission. But no relief has been sought in this case against a rate or practice alleged to be unjust because unreasonable or discriminatory. The Freight Rate Authority under which the Supplement was published stated that silk was to be placed in the class of commodities that would not be accepted for transportation. The contention made in support of the granting of the injunction was that the Director-General had exceeded his statutory powers, and that, hence, the supplement published and put into effect was void, and that upon the return of the carriers to private control the individual carriers could not keep in force the Supplement, refusing to accept for transportation this commodity of freight. As a further analogy to the case cited it is submitted, that, had this matter been first referred to the Commission and the supplement had been approved, the Court, under the opinion of Justice Brandeis, would have had the right to have

restrained the effectiveness of the order, because of error in the application of rules of law to the case. The Commission by such an order would have decided that silk was not a commodity subject to the Act creating the Commission. The Act does not define what goods are subject to the Act and therefore it is clearly a judicial question to interpret the Act as to what goods are subject to it.

The same applies to the individual carriers. They are common carriers and as such must carry all goods tendered for carriage unless they may excuse themselves on some ground of positive law.

Royal Brewing Company vs. Mo. K. & T. Ry. Co., Supra.

The law is positive, however, that goods must be classified.

In determining whether an order of the Interstate Commerce Commission shall be suspended or set aside, power to make—and not the wisdom of—the order is the test and this Court must consider all relevant questions of constitutional power or right, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to be made and also whether even if in form it is within such delegated authority it is not so in substance because so arbitrary and unreasonable as to render it invalid.

I. C. C. V. Ill. Cent. R. R., 215 U. S. 452 (1910).

In conclusion it is respectfully submitted that for the Court to fail to sustain the District Court would be:

(1) To tear down the law of Common Carriers

(2) To destroy the transportation system of the country—giving to each carrier the right to refuse to

carry such commodities as it saw fit even though another carrier might consent to carry it and giving the carriers, as a whole, the right to abjure their public function completely;

(3) To permit any subordinate officer of government to act without restraint whether lawfully or not;

(4) To refuse the protection of the Courts;

(5) To deny Constitutional guarantees;

(6) To make a nullity the doctrine of equitable relief.

Respectfully submitted,
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November, 1920.